No. 91-1393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

A. L. LOCKHART, Director,
Arkansas Department of Corrections,

Petitioner,

vs.

BOBBY RAY FRETWELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a state defendant "prejudiced," within the meaning of *Strickland* v. *Washington*, by his attorney's failure to make an objection based on a federal circuit precedent which (1) was wrongly decided, (2) was never accepted in or binding on the state courts, and (3) has since been overruled?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the contention that the failure of trial counsel in an Arkansas court to raise a claim based upon Eighth Circuit precedent constituted ineffective assistance of counsel, in spite of the fact that the Eighth Circuit precedent had subsequently been

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1. CJLF has received written consent from both parties to file this brief.

overruled. This ruling, if affirmed, would permanently exempt a convicted murderer from full punishment, even though he is guilty of a capital offense and a properly instructed jury has found the death penalty to be an appropriate punishment. Such an injustice is contrary to the rights of victims and society which CJLF was formed to advance. CJLF therefore has an interest in the case.

SUMMARY OF FACTS AND CASE

Petitioner entered the home of Sherman Sullins and robbed him of his money at gunpoint. He then struck Mr. Sullins on the head with his gun. When this failed to kill Sullins, petitioner placed the barrel of his gun to Sullins' temple and shot and killed him. Petition for Writ of Certiorari ("Pet. Cert.") Appendix A-22 (District Court memorandum opinion).

Petitioner was convicted of murdering Sullins in the course of a robbery. At the sentencing phase, the court instructed the jury on two aggravating circumstances: that the crime was committed for the purpose of avoiding arrest and that it was committed for the purpose of pecuniary gain. Trial counsel failed to object to the pecuniary gain instruction. Six months earlier the Eighth Circuit had held that it was unconstitutional to use pecuniary gain as an aggravating circumstance in robbery-murder cases. Pet. Cert. 4-5.

Petitioner's conviction and death sentence were affirmed by the Arkansas Supreme Court. *Fretwell* v. *State*, 289 Ark. 91, 708 S. W. 2d 630 (1986). The Eighth Circuit granted habeas relief. It found that trial counsel's failure to attack the pecuniary gain instruction based on the prior Eighth Circuit precedent was ineffective assistance of counsel in spite of the fact that this Eighth Circuit precedent had been effectively overruled by the Supreme Court after petitioner's trial. See *Fretwell* v. *Lockhart*, 946 F. 2d 571 (CA8 1991). The Eighth Circuit

also ordered the District Court "to reduce unconditionally Fretwell's sentence to life imprisonment without parole." *Id.*, at 578.[2]

SUMMARY OF ARGUMENT

Collins v. *Lockhart*, 754 F. 2d 258 (CA8 1985) was never the law in Arkansas state courts. The precedents of the lower federal courts are not binding on state courts. Therefore, it is incorrect to presume that Arkansas courts would have been obligated to uphold a *Collins* objection had it been made.

Ineffective assistance of counsel claims should be strictly limited to their purpose. These claims penalize the state even when it does nothing wrong. The person responsible for the wrong, defense counsel, is the traditional opponent of the state over whom it may exert little if any control.

There is also a real danger of spurious ineffective assistance claims. The institutional constraints that limit unfounded malpractice claims in civil cases are largely absent from ineffective assistance attacks. This is particularly true in capital cases, where nearly every capital conviction spawns an ineffective assistance claim.

The prejudice requirement for ineffective assistance should be limited to errors undermining confidence in the result of the trial. Both the right to counsel and the subsidiary right to effective assistance of counsel are grounded in the notion that defense counsel is needed to insure the reliability and justice of criminal trials. There is no right to an improper acquittal.

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2. The court's authority to issue this order is highly doubtful. See *Irvin* v. *Dowd*, 366 U. S. 717, 728 (1961). It is unclear whether the state has sought review of this holding. See Pet. Cert. 6-7, 17. That issue need not be addressed, since the predicate Sixth Amendment holding is clearly erroneous.

Failure to raise an incorrect decision by the Eighth Circuit did not prejudice Fretwell's trial. Just as there is no right to a lawless factfinder under *Strickland*, so there is no right to an erroneous decision of law. Just as there is no right to false evidence under *Nix* v. *Whiteside*, so there is no right to false law.

Fretwell has lost nothing to which he was entitled. He has suffered no legally cognizable prejudice.

ARGUMENT

I. *Collins* was never the law in Arkansas state courts.

In addressing the prejudice component of Fretwell's claim, the Eighth Circuit committed a breathtaking error regarding the relations between federal and state courts. The court held that "since state courts are bound by the Supremacy Clause to obey federal constitutional law, we conclude that a reasonable state trial court would have sustained an objection based on *Collins*[3] had Fretwell's attorney made one." *Fretwell* v. *Lockhart*, 946 F. 2d 571, 577 (CA8 1991). The court then goes on to hold that *Collins* was "good law" at the time of Fretwell's trial in *state* court and that he was therefore "*entitled* to its benefits." *Id.*, at 578 (emphasis added).

It is evident from these statements that the Eighth Circuit believes that its precedents are binding on state courts within the circuit to the same extent as they are binding on federal district courts. The contrary rule is almost universally recognized by courts and commentators, although there does not appear to be any direct statement by this Court on the precise point. Clarifying the status of circuit precedents, i.e. whether they are binding or merely persuasive, is necessary for the daily operation of state

3. *Collins* v. *Lockhart*, 754 F. 2d 258 (CA8 1985), overruled in *Perry* v. *Lockhart*, 871 F. 2d 1384, 1393 (CA8 1989).

courts where these precedents are routinely cited. Therefore, *amicus* respectfully requests that the Court make a clear statement of the law on this point.

The doctrine of *stare decisis* has "spawned a vast literature." 1B J. Moore, *Moore's Federal Practice* ¶ 402[1], at 5, n. 1 (1992) (cited below as "Moore"). Most of that literature, however, deals with the question of when courts should adhere to their own precedents and when they should overrule them. See, *e.g.*, Traynor, *Limits of Judicial Creativity*, 29 Hastings L. J. 1025 (1978).

Precedents established by other courts have received far less attention, no doubt because the rules are quite simple. A precedent established by a "higher" court is mandatory. Only the court of last resort can overrule its own precedent, and until it does that precedent is binding on all lower courts. See, *e.g.*, *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U. S. 533, 535 (1983). On the other hand, it is equally well established that the decision of a coordinate court is not binding precedent. See Moore, *supra*, at 14-18: H. Black, *Law of Judicial Precedents* 117 (1912). Thus, a decision of one federal circuit is not binding on another circuit as *stare decisis* when the same question of law is presented in a different case. *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, 488 (1900).[4]

The question of what is a "higher" court for this purpose is one that rarely arises. One would think that the point is so well settled that no discussion is necessary, but the Eighth Circuit's statements in this case make discussion necessary. According to Professor Moore, courts are obligated to follow the precedents established by courts to which they "owe obedience," see Moore,

4. Prior adjudication by a coordinate court in the *same* case is entirely different. See *Christianson* v. *Colt Industries*, 486 U. S. 800, 816 (1988) (law of the case); Moore, *supra*, ¶ 0.401, at 3-5 (distinguishing *stare decisis* from *res judicata* and related doctrines).

supra, at 12, but this is merely a way of stating the conclusion. The rule seems to be that one court owes obedience to another where the latter has jurisdiction to reverse the judgment of the former directly and not collaterally.

The power to entertain a collateral attack on a judgment does not render a court's decisions binding precedent on the court which entered the judgment. In *Price* v. *Johnston*, 334 U. S. 266, 269-270, 286 (1948), for example, a federal district court in California had the power to entertain a collateral attack on a judgment of a federal district court in Michigan, and was reversed for not doing so. All of the district courts had the power to entertain such attacks on each other's judgments at the time.[5] Yet this power did not make every district's precedents binding in every other district.

The Court of Appeals in the present case asserted the Supremacy Clause as the basis of its claim to make binding precedent for Arkansas courts. 946 F. 2d, at 577. This is a red herring. A state court which declines to follow circuit precedent is not asserting state law over federal law; it is merely disagreeing over what the federal law actually is. That question is not settled until the court of last resort has spoken. See *Posados* v. *Warner, Barnes & Co.*, 279 U. S. 340, 345 (1929).

The Supremacy Clause does make a federal court's order prevail over a state court's order when both courts happen to have jurisdiction of the same subject matter. Thus in *Ableman* v. *Booth*, 62 U. S. 506, 523 (1859), a state court was not permitted to issue habeas corpus to free a federal prisoner, while federal courts do have the power to free state prisoners, 28 U. S. C. § 2254. As noted earlier, however, this *collateral* review power does not render one court's decisions mandatory precedent in another court.

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5. This was before the enactment of 28 U. S. C. § 2255.

Perhaps the clearest statement of the rule is that given by Professor Moore:

> "In matters of federal law, of course, all the state courts owe obedience to the decisions of the Supreme Court of the United States [footnote omitted], but the decisions of the courts of appeals in the circuit embracing the state, or those of the district court of the district in which the trial takes place do not govern under the doctrine of stare decisis.[40]

"[40] In cases in which federal law is applied, and the jurisdiction in federal and state courts is concurrent, the state court must follow the federal law, and the decisions of the inferior federal court are, naturally, persuasive authority on issues as yet unresolved by the Supreme Court. In such cases, however, the state courts owe no special obedience to the decisions of the particular circuit in which the state is located, or in the strict sense, to the decisions of the federal inferior courts as a class, and any error they may make in their interpretation of the federal law must be corrected by the Supreme Court. See Amalgamated Clothing Workers of America v. Richman Brothers (1955) 348 U. S. 511, 75 S. Ct. 452, 99 L. Ed. 600." 1B Moore, *supra*, at 23.

This rule has been established for a long time. It was hornbook law 80 years ago. Black, *supra*, at 372; see also 9 B. Witkin, *California Procedure* § 780, at 751 (3d ed. 1985). It is also the rule followed by the majority of state courts. See, *e.g.*, *Dewey* v. *R. J. Reynolds Tobacco Co.*, 121 N. J. 69, 577 A. 2d 1239, 1244-1245 (1990); *People* v. *Del Veccio*, 129 Ill. 2d 263, 544 N. E. 2d 312, 327 (1989); *State* v. *Barefield*, 110 Wash. 2d 728, 756 P. 2d 731, 733, n. 2 (1988); *South Salina Street, Inc.* v. *Syracuse*, 68 N. Y. 2d 474, 503 N. E. 2d 63, 70-71 (1986); *State* v. *Moyle*, 299 Or.

691, 705 P. 2d 740, 750 (1985); *Head* v. *State*, 253 Ga. 429, 322 S. E. 2d 228, 231 (1984); *Commonwealth* v. *Montanez*, 388 Mass. 603, 447 N. E. 2d 660, 661-662 (1983); *State* v. *Dwyer*, 332 So. 2d 333, 335 (Fla. 1976); *People* v. *Bradley*, 1 Cal. 3d 80, 86, 460 P. 2d 129, 132 (1969).

The rules and practice of this Court further confirm that state courts have the power and the duty to make independent judgments of federal law and not mechanically follow the circuits. Rule 10.1 lists some of the reasons guiding this Court's decision on whether to grant certiorari, including the following (emphasis added):

> "(a) *When a United States court of appeals* has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or *has decided a federal question in a way in conflict with a state court of last resort*; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> "(b) *When a state court of last resort has decided a federal question in a way that conflicts with* the decision of another state court of last resort or of *a United States court of appeals*."

If state courts were bound by the Supremacy Clause to follow the lower federal courts, the italicized portions of this rule would not be needed. A federal decision conflicting with a state decision would be controlling, the state decision would no longer be good law, and there would be no need for this Court to resolve the conflict. Conversely, a state court refusal to follow federal circuit precedent would not require hearing the case on the merits, but only summary reversal with instruction to follow binding precedent.

The rule reads the way it does precisely because circuit precedent is *not* binding on the states. When a conflict arises, this Court grants certiorari to resolve the conflict,

exactly the same as it would if two federal circuits were in conflict. See, *e.g.*, *Walton* v. *Arizona*, 111 L. Ed. 2d 511, 524, 110 S. Ct. 3047, 3054 (1990). In such cases, it is not unusual for this Court to decide that the state court was correct. See, *e.g.*, *ibid*.

The Arkansas Supreme Court evidently takes the view that it is not bound to follow the Eighth Circuit. In *Hendrickson* v. *State*, 285 Ark. 462, 688 S. W. 2d 295, 297 (1985), for example, the state court refused to follow *Grigsby* v. *Mabry*, 758 F. 2d 226 (CA8 1985). The Arkansas Supreme Court was entirely correct in taking this position. *Grigsby* was later reversed in a companion case, *Lockhart* v. *McCree*, 476 U. S. 162, 165 (1986).

At the time of Fretwell's trial, *Collins* v. *Lockhart*, 754 F. 2d 258 (CA8 1985) was binding precedent *only* in the federal courts of the Eighth Circuit. Arkansas state courts were no more obligated to follow it than were the other federal circuits. The Eighth Circuit's conclusion that Fretwell *necessarily* would have been sentenced to life in prison if his lawyer had made a *Collins* objection is therefore wrong. Even more important, however, is the question of whether this possible loss of a wrongful escape from a deserved punishment is "prejudice" justifying the overturning of a final judgment.

II. Ineffective assistance of counsel claims should be strictly limited to their purpose.

A. Unique Nature.

Claims of ineffective assistance of counsel are unique to constitutional criminal procedure. Every other constitutional error is the consequence of some state wrongdoing, such as passing a vague law, see *Connally* v. *General Constr. Co.*, 269 U. S. 385 (1926); coercing a confession, see *Brown* v. *Mississippi*, 297 U. S. 278 (1936); giving improper jury instructions, see *In re Winship*, 397 U. S. 358 (1970); or withholding exculpatory evidence, see *Brady*

v. *Maryland*, 373 U. S. 83 (1963). For an ineffective assistance of counsel claim, however, a state does nothing wrong but still sees its conviction overturned.

The passive role the state must play regarding ineffective assistance of counsel places a duty on the courts to strictly limit this claim to its core purpose, assuring that counsel's representation does not "so undermine[] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* v. *Washington*, 466 U. S. 668, 686 (1984). If ineffective assistance claims are not strictly limited, then the integrity of the criminal justice system will be threatened as the state is forced to defend its convictions against conduct over which it has neither responsibility nor control.

1. State action.

With one exception[6] the federal Constitution may be invoked only to prohibit state action. See J. Nowak, R. Rotunda & J. Young, *Constitutional Law* § 12.1, at 421 (3d ed. 1986). In the typical constitutional case, the state action question is not controversial, with state action being readily apparent. See *ibid*. In those cases where it is at issue, where someone attempts to attribute the actions of an individual to the state, caution is prudent.

> "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. *It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.* A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our

6. See U. S. Const. amend. XIII.

> political order." *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 936-937 (1982) (emphasis added).

Thus state action will be found only where an individual's actions can "be *fairly* attributable to the State." *Id*., at 937 (emphasis added). In the standard criminal case this is a given. There are no more evident state actors than police, prosecutors, judges, or legislatures, the sources of most constitutional conflict in criminal law. Ineffective assistance of counsel, however, is different. Of all the claims made by a criminal defendant this one is the most difficult to attribute to the state because the culprit, the incompetent attorney, is immune from state supervision. Defense counsel is, if anything, an opponent of the state.

2. Defense counsel and the state.

Defense counsel is the paid opponent of the state. "The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability and according to law." ABA, Standards for Criminal Justice, Standard 4-1.1(b) (2d ed. 1986). If counsel is privately employed, the state can exert no more influence over him than it can over any other private attorney.

> "[T]he clearly articulated judicial view is that the American criminal defense lawyer plays a vital role in the administration of justice. A lawyer functioning in that role owes loyalty to his or her client alone." C. Wolfram, *Modern Legal Ethics* § 10.5, at 588-589 (1986) (footnote omitted).

In *Polk County* v. *Dodson*, 454 U. S. 312 (1981), this duty of loyalty was central to the holding that a public defender's representation of a client did not come within color of state law. Although public defenders were employees of the state, this did not alter the traditional attorney-client relationship. " 'Once a lawyer has under-

taken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.'" *Id.*, at 318 (quoting ABA, Standards for Criminal Justice, Standard 4-3.9 (2d ed. 1986)).

The fact that defense counsel is considered an officer of the court did not change the analysis. Our adversarial system requires defense counsel to oppose the state.

> "The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.' " *Id.*, at 318-319 (quoting *Ferri* v. *Ackerman*, 444 U. S. 193, 204 (1979)).

Any effort by the state to control the public defender's representation of the accused runs into the Sixth Amendment's guarantee of counsel. "Implicit in the concept of a 'guiding hand' is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate." *Id.*, at 322.[7]

When a conviction is reversed due to ineffective assistance of counsel, the state is being penalized even though it did nothing wrong. Not only is the state an innocent bystander, it is also difficult for the state to spot incompetence until it is too late. "Many aspects of [defense] counsel's performance either occur outside the trial court's notice or reasonably appear to be, though they are not in fact, competent. Thus, the existence of incompetence does not necessarily imply fault on the part of the state." Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. Chi. L. Rev. 1380, 1397 (1983).

7. The precedential value of *Polk County* is not diminished by *Georgia* v. *McCollum*, 60 U.S.L.W. 4574 (June 18, 1992). That case deals with the unique circumstance of defense counsel using a state-granted power to discriminate against a third person in the selection of a governmental body. *Id.*, at 4577-4578.

A successful ineffective assistance of counsel claim penalizes the state for an act over which it has neither control nor responsibility. Thus, the state acts as an insurer against a criminal defendant's risk of incompetent counsel, spreading the risk from defendants to the people through reversed convictions.

But criminal convictions are not accidents to be insured against, and the Sixth Amendment is not an insurance policy. While it may make sense to reverse convictions for some of counsel's errors, the state cannot be required to assure an ideal trial. Ineffective assistance claims already place a burden on the fairness of the criminal justice system. If counsel's error does not undermine confidence in the verdict, then that error should not be a ground for reversal. Review of counsel's performance should not be a tool to free the guilty, but an assurance of the fundamental justice of our legal system.

B. Crying Wolf.

Every litigation involves at least one winner and one loser. An unfortunate side effect of this fact is the all too human tendency of a losing litigant to place responsibility for the defeat on his attorney. See R. Mann & F. Smith, *Legal Malpractice* § 1.1, at 7 (3d ed. 1989). This leads to the risk of spurious malpractice claims. In civil law there is some protection from these claims. The standard method for an aggrieved client to remedy his attorney's civil malpractice is through a civil suit against the ineffective counsel. While many losing litigants may feel that their attorneys were substandard, the civil litigation process will screen out most spurious claims.

In addition to being ethically bound not to pursue meritless actions, see C. Wolfram, *Modern Legal Ethics* §

11.2.2, at 595 (1986), an attorney has substantial economic incentive not to file a meritless malpractice action. Many plaintiffs' attorneys are paid through contingency fees. See *id.*, § 9.4.1, at 526. An attorney paid on a contingency basis will not accept employment to prosecute a malpractice claim unless success is at least feasible. See *id.*, at 528. Even if an attorney is paid in some other way, there is ample incentive to take only feasible malpractice claims. An unsuccessful malpractice claim can itself be the basis of a subsequent malpractice claim. *Id.*, § 5.6.1., at 207, n. 38. Finally, the aggrieved client, if sufficiently rational, is likely to pay heed to warnings that a malpractice claim is not feasible and drop the action. Litigation is an unpleasant and expensive experience and few will voluntarily undergo it if success is unlikely.

These institutional constraints are largely missing from ineffective assistance of counsel attacks. A convicted criminal who cannot afford appellate counsel is entitled to appointed counsel for his first appeal as of right. *Douglas* v. *California*, 372 U. S. 353, 357 (1963). While no such constitutional right exists for habeas corpus, *Murray* v. *Giarratano*, 492 U. S. 1 (1989), Congress has provided funding for habeas corpus counsel for death row inmates. 21 U. S. C. § 848(q)(4)(B).

As there is little if any economic disincentive on a convicted criminal's ability to make a challenge to his conviction, criminal defense attorneys are particularly prone to allegations of incompetence through ineffective assistance of counsel claims. This is especially true in death penalty litigation. Death row inmates have a particularly keen interest in seeing their convictions overturned and have free access to attorneys to pursue federal habeas corpus claims. These problems are aggravated by the existence of a body of opponents to the death penalty who will do virtually anything to prevent executions. See, *e.g.*, *Gomez* v. *U. S. District Court*, 118 L. Ed. 2d 293, 112 S. Ct. 1652 (1992). This can only create a hothouse

environment for ineffective assistance of counsel claims in capital cases.

This climate is supplemented by the complexity of death penalty law. Few areas of the law are as complicated as the death penalty. The frailties of human nature make mistakes by defense counsel inevitable in such a climate. Yet no one is entitled to a perfect defense.

> "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—*even if defense counsel may have made demonstrable errors*—the kind of testing envisioned by the Sixth Amendment has occurred." *United States* v. *Cronic*, 466 U. S. 648, 656 (1984) (emphasis added) (footnotes omitted).

Yet in capital litigation, convicted defendants are attempting to make perfection the standard of competence in order to thwart execution of their sentence. Thus in one habeas attack on a capital conviction

> "In support of this contention, [that counsel was ineffective] an experienced capital defense attorney testified in appellant's behalf that effective assistance of counsel in a capital case *requires raising and preserving every colorable claim at trial and on appeal.* Thus according to this attorney, the failure of appellant's counsel to raise and preserve all colorable claims constituted ineffective assistance of counsel." *Lindsey* v. *Smith*, 820 F. 2d 1137, 1144 (CA11 1987) (emphasis added).

This Court has, of course, held expressly to the contrary, *Smith* v. *Murray*, 477 U. S. 527, 536 (1986), but the attitude persists.

Thus in capital cases, ineffective assistance of counsel claims have become the rule rather than the exception. In a study of federal habeas corpus, K. Scheidegger, *Rethink-*

ing Habeas Corpus (1989), reprinted in *Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 212 (1991), *amicus* developed a list of capital habeas cases decided by the Eleventh Circuit between 1986 and 1989. The study examined decisions involving 70 different litigants seeking habeas relief from their death sentences. The cases are listed in the Appendix.

At least[8] 56 of the 70 petitioners made ineffective assistance counsel claims at some point on federal habeas corpus. Of these 56 claimants, 7 were successful in the Eleventh Circuit with their ineffective assistance claims, 44 had their claims rejected, and another 5 did not have a final decision on their claims. Thus, at least four-fifths of the capital petitioners made ineffectiveness claims, and only one-eighth of the claims were found to have merit.

One problem with this flood of meritless claims is that it delays the execution of judgment in capital cases. Habeas claims, even if spurious, require time to resolve. This is particularly true of ineffective assistance claims, which usually involve extensive discovery outside the trial record and can involve long habeas hearings at the district court level. Such meritless delay withers respect for the criminal justice system. See *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 543, 111 S. Ct. 1454, 1466 (1991).

An equally disturbing effect is the possible erosion of the quality of counsel in capital cases. Defending someone accused of capital murder is not an easy task. The cases are complex, failure is frequent, the pay is not lucrative, and clients are almost always reprehensible. Yet, as the Eleventh Circuit's experience demonstrates, the vast majority of capital defendants receive adequate representation. If, however, even adequate representation

8. We say "at least" because some may have made the claims in unreported decisions.

will bring about a claim of ineffective assistance of counsel, then many attorneys who would otherwise take capital cases may withdraw from the field. "[T]he raising of such unfounded charges [of ineffective assistance] must have a significant 'chilling effect' on the willingness of experienced attorneys . . . to undertake the defense of capital cases. Petitioner's attorneys here might do well to reconsider their apparent policy of routinely attacking the performance of counsel in light of this fact." *Blake* v. *Zant*, 513 F. Supp. 772, 802, n. 13 (S.D. Ga. 1981); accord *Strickland*, *supra*, 466 U. S., at 690.

Finally, the barrage of meritless claims endangers the relatively few worthy ineffective assistance claims. "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones." *Brown* v. *Allen* 344 U. S. 443, 537 (1953) (Jackson, J., concurring in the result).

Ineffective assistance litigation is a heavy burden on the criminal justice system. This burden is a necessary evil where the reliability of the result is in grave doubt. It becomes less necessary and more evil as the question moves farther away from reliability. Despite the Court's contrary intent, *Strickland* did "encourage the proliferation of ineffectiveness challenges." 466 U. S., at 690. To place some limits on this proliferation, the prejudice component of *Strickland* needs to be precisely and narrowly defined.

III. The *Nix* v. *Whiteside* concurrence's concept of "legally cognizable prejudice" should be adopted.

A. Basis of the Doctrine: Powell to Strickland.

From the very beginning, the right to effective assistance of counsel has been based on the unreliability of trial without counsel. A lay defendant

> "lacks both the skill and knowledge adequately to prepare his defense, *even though he have a perfect one.* He requires the guiding hand of counsel at

> every step in the proceedings against him. Without it, *though he be not guilty*, he faces the danger of conviction because he does not know how to establish his innocence." *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932) (emphasis added).

In *Powell*, counsel were not appointed until the morning of the trial. *Id.*, at 56. Under the circumstances, this was a denial of due process of law, because the timing of the appointment "preclude[d] the giving of effective aid in the preparation and trial of the case." *Id.*, at 71. The Court's discussion of the circumstances of the case implies a well-founded concern as to whether the defendants were actually guilty. *Id.*, at 50-52.

A precursor of the *Strickland* prejudice requirement can be seen in *Avery* v. *Alabama*, 308 U. S. 444 (1940). In *Avery*, counsel were appointed three days before trial. *Id.*, at 447. In affirming, the Court noted "the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted." *Id.*, at 452; cf. *Strickland* v. *Washington*, 466 U. S. 668, 699-700 (1984).

The most explicit statement about a real possibility of innocence came in *Glasser* v. *United States*, 315 U. S. 60, 67 (1942):

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

In announcing the prejudice element of an ineffective assistance claim, *Strickland* brought to the surface and made explicit what had been an implicit undercurrent in *Powell*, *Avery*, and *Glasser*. Because the right to effective

assistance is a component of a right to a fair trial, ineffective assistance is a ground for reversal only when it renders the trial unfair. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*." *Strickland* v. *Washington*, *supra*, 466 U. S., at 687 (emphasis added).

Washington's claim was that certain evidence had been omitted from the penalty phase of his trial. *Id.*, at 700. With this evidentiary issue in mind, the Court explained its "reliable result" principle by borrowing a standard from other rules dealing with omitted evidence. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See *id.*, at 694 (citing *United States* v. *Agurs*, 427 U. S. 97, 104 (1976) (information not disclosed by prosecution); *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 872-874 (1982) (deported witness)).

The *Strickland* Court made clear, however, that this test was a guide and not a mechanical rule. "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged . . . ." *Id.*, at 696. The keys are reliability and confidence that the result is just. See *ibid*. In a different context, the evidence-oriented test of reasonable probability of a different result may not be the appropriate one for implementing the underlying principle.

B. Perjury and Prejudice.

A radically different context was not long in coming. The testimony that Washington claimed should have been presented was presumably truthful, if weak. Emanuel Whiteside had an entirely different strategy in mind. He wanted to lie. *Nix* v. *Whiteside*, 475 U. S. 157, 161 (1986). His attorney refused to let him. *Ibid*. The Eighth Circuit held that this was ineffective assistance. *Id.*, at 163.

The *Nix* majority devotes most of the opinion to the performance component of the *Strickland* test, and its discussion of the prejudice prong is consequently brief. "Even if we were to assume that the jury might have believed his perjury, it does not follow that Whiteside was prejudiced." *Id.*, at 175-176. Unfortunately, instead of explaining *why* a reasonable probability of a different result is insufficient to establish prejudice in this context, the majority proceeds directly to distinguishing the cases of presumed prejudice, for which no showing is required. *Id.*, at 176.

Justice Blackmun's concurring opinion is more helpful. By denying the claim solely on the prejudice ground, the concurrence effectively holds that Whiteside had no claim, even if his lawyer's conduct fell below Sixth Amendment minimums. To reach this result, the concurrence returns to the underlying principle of the *Strickland* prejudice component. "The touchstone of a claim of prejudice is an allegation that counsel's behavior did something 'to deprive the defendant of a fair trial, a trial whose result is reliable.' " *Id.*, at 184 (quoting *Strickland*). Since withholding false evidence does not detract from reliability, Whiteside had no claim. *Id.*, at 185. This is true, Justice Blackmun makes quite clear, *even if* the false evidence might have changed the result. *Id.*, at 186.

Thus, it is not a universal rule that any error which had a reasonable probability of changing the result satisfies the prejudice prong. The Court unanimously rejected Whiteside's prejudice claim even assuming the result would have been different. *Id.*, at 175-176 (majority); *id.* at 186-187 (concurrence). *Strickland* laid down the different-outcome test in the context of the facts of that case, but the test should not be applied where it does not implement the underlying principle of reliability.

C. Kimmelman v. Morrison.

The decision in *Kimmelman* v. *Morrison*, 477 U. S. 365 (1986) must be read carefully in light of the facts, issues, and arguments before the Court in that case. Morrison's trial counsel had failed to timely move for the exclusion of evidence on the ground it had been illegally seized. *Id.*, at 368-369. When the federal courts granted habeas relief for ineffective assistance, the state attorney general petitioned for certiorari. The state asked that *Stone* v. *Powell*, 428 U. S. 465 (1976) be extended to ineffective assistance claims where the underlying error is based on the exclusionary rule. 477 U. S., at 368; see also *id.*, at 397, n. 4 (Powell, J., concurring in the judgment).

Stone is a case establishing an exception to the rule of *de novo* review of federal constitutional claims on habeas corpus. *Stone*, 428 U. S., at 481-482. It has no effect on the manner in which state courts should review such claims on direct appeal. What the state sought in *Kimmelman* was an exception to the holding of *Strickland* that the legal issues in ineffective assistance claims would be reviewed *de novo* on habeas. See *Strickland*, 466 U. S., at 697-698. The Court unanimously rejected this request. *Kimmelman*, 477 U. S., at 382-383 (majority); *id.*, at 391 (concurrence). An ineffective assistance claim based on failure to move for suppression of evidence is thus reviewed on habeas exactly the same as it is on direct review.

The discussion of prejudice in *Nix*, *supra*, raises another question, however. That question was not argued in *Kimmelman*. "The more difficult question is whether the admission of illegally seized but reliable evidence can ever constitute 'prejudice' under *Strickland*. There is a strong argument that it cannot. But that argument has neither been raised by the parties nor discussed by the various courts involved in this case." *Id.*, at 391 (Powell, J., concurring in the judgment).

Justice Powell's concerns were apparently prompted by the majority's statement that "[w]e decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." *Id.*, at 380. The first part of this statement is a pure example of the straw man fallacy. Neither the state nor the concurrence contended that the right was conditioned on actual innocence. The second part confounds the scope of the right with the question of when an error is ground for reversal. The prejudice component of *Strickland* is addressed only to the latter. The majority then goes on to acknowledge the limited issue before the Court and the true holding of the case: ineffective assistance in the litigation of a Fourth Amendment claim is judged the same on habeas as on direct review. *Ibid*. The question raised by the concurring opinion is still open.

Even if the majority's broad language is considered authoritative, however, that language is contrary to the Eighth Circuit's holding in the present case. The majority states unequivocally that a meritorious issue is "necessary to the success of a Sixth Amendment claim like respondent's . . . ." *Id.*, at 382. The need to establish the merits of the claim is clear from the Court's decision to remand. The State was entitled to show that the search was legal. *Id.*, at 390-391. This entitlement is not phrased in terms of a probability that the state would have prevailed on the issue at trial. If the search was legal, there was no prejudice.

D. Right to Assistance v. Right to Reversal.

There is no question that a defendant is entitled to the "guiding hand of counsel at every step of the proceedings . . . ." *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932). The question on the prejudice component of *Strickland* is

whether an error or assumed error[9] is ground for reversal. The prejudice discussions in *Strickland*, *Kimmelman*, and *Nix* must be read together in the context of the facts of each case.

In *Strickland* there was no question that omitted evidence was relevant and admissible. See *Hitchcock* v. *Dugger*, 481 U. S. 393, 394 (1987) (all evidence proffered as mitigating must be considered). Therefore the only issue regarding reliability of the result was whether that evidence would have made a difference. See *Strickland*, 466 U. S., at 694.

In *Kimmelman*, the admissibility of the evidence was hotly disputed, though its veracity and relevance were not. *Kimmelman* therefore added to *Strickland's* "reasonable probability" requirement a condition that admitted evidence actually be inadmissible. *Kimmelman*, 477 U. S., 382, 390-391. To those who still believe in the exclusionary rule, a conviction on illegally obtained evidence is a "wrong" result. See, *e.g.*, 1 W. LaFave, *Search and Seizure* § 1.1(f), at 17 (2d ed. 1987). Even those who disagree with the rule must concede that the result is contrary to what the law would require if the controversy had been fully aired and correctly decided. Failure to object to illegally seized evidence, therefore, arguably qualifies for the basic definition of prejudice: "the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466 U. S., at 696.

The evidence in *Nix* lies at the opposite end of the spectrum from the evidence in *Strickland*. Lying under oath is not merely an error, it is a felony. Unlike the exclusionary rule, where the justice of the result is debatable, no one could contend that a trial where a defendant

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9. If the court addresses the prejudice component first, see *Strickland*, 466 U. S., at 697, it may never reach the question of whether an unprofessional error was actually committed.

is restrained from lying is thereby rendered less reliable or less likely to produce a just result. See *Nix*, *supra*, 475 U. S., at 185 (Blackmun, J., concurring in the result). Where introducing evidence would be wrong, omitting that evidence cannot be prejudicial, regardless of whether it might have changed the result.

There are many cases where defense lawyers have obtained wrong verdicts for their clients. See *id*., at 186. *Strickland* makes clear that defense counsel's failure to obtain a wrongful acquittal is not reversible error, even if a better lawyer might have obtained one. A failure to make a pitch for jury nullification is not prejudice, for example, even if a competent lawyer would have made one, and even if it would have worked. See *Strickland*, 466 U. S., at 694-695.

The question is not whether the defendant was deprived of a "sporting chance." See *Brady* v. *Maryland*, 373 U. S. 83, 90 (1963). It is only whether there is reason to lack confidence in the result. *Strickland*, 466 U. S., at 691-692. The scope of reversible error is therefore narrower than the scope of the defendant's right to effective assistance. Even where an effective lawyer could have "gotten him off" by causing the system to malfunction in some way, defendant is not entitled to a reversal.

E. Legally Cognizable Prejudice.

The answer to the riddle, *amicus* submits, lies in the *Nix* concurrence's concept of "legally cognizable prejudice." See *Nix* v. *Whiteside*, 475 U. S. 157, 184 (1986) (Blackmun, J., concurring in the result). It is not enough that the attorney's error might have changed the result. If the alleged error involves a claim of "a right the law

simply does not recognize," then it cannot form the basis of a valid claim.[10] *Id*., at 186.

The law does not recognize a right to a lawless decision maker. *Ibid*. (quoting *Strickland*, 466 U. S., at 695). The law does not recognize a right to present perjured testimony. *Ibid*. The law does not recognize a right to erroneous rulings from the trial court.

Legal doctrines change, of course, and a trial court ruling which was perfectly "correct," in the sense of obedience to precedent, may nonetheless be reversed as "error" if the precedent is overruled. In applying the performance component of *Strickland*, a court must look at the law at the time of the alleged error or omission. See *Strickland*, 466 U. S., at 690. It does not follow, however, that the question of whether any prejudice is legally cognizable should be governed by overruled law.

The "retroactivity" aspect of this problem need not be resolved in the present case, however. For the reasons set forth in part I, *ante*, at 4-9, *Collins* v. *Lockhart*, 754 F. 2d 258 (CA8 1985) was never the law in Arkansas state courts. Indeed, in its consideration of Fretwell's case, the Arkansas Supreme Court explicitly referred to the *Collins* argument as an attempt "to change the law." *Fretwell* v. *State*, 289 Ark. 91, 708 S. W. 2d 630, 634 (1986).

Fretwell, therefore, did not lose any right which the law presently recognizes or which the law in Arkansas state courts has ever recognized. The Arkansas Supreme Court has told us quite plainly that no such right was recognized at the time of the trial and appeal, and this Court's decision in *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988) settles authoritatively that there is no such right.

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10. Whether exclusion of illegally seized evidence is a "right" or a "windfall," see *Kimmelman* v. *Morrison*, 477 U. S. 365, 396 (1986) (Powell, J. concurring in the result), is a question which can and should await a case where it is both presented by the facts and argued in the briefs.

For the purpose of defining legally cognizable prejudice, false law is no different from false evidence. It is possible that the people might have been cheated out of justice, in a judgment from which they could not appeal. That possibility does not constitute legally cognizable prejudice. *Nix* v. *Whiteside*, *supra*, 475 U. S., at 186 (Blackmun, J., concurring in the judgment). The objection Fretwell's lawyer failed to make was, in reality, without merit. He has lost nothing to which he was entitled.[11] "Since [Fretwell] was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice." *Id.*, at 186-187.

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11. In finding prejudice, the Eighth Circuit committed an obvious but common error. "In our view, fundamental unfairness exists when a prisoner receives a death sentence rather than life imprisonment *solely because* of his attorney's error." *Fretwell* v. *Lockhart*, 946 F. 2d 571, 577 (CA8 1991) (emphasis added); cf. *Butler* v. *McKellar*, 494 U. S. 407, 430 (1990) (Brennan, J., dissenting). That is like saying that a nonswimmer who deliberately plunged into a deep lake has drowned "solely because" the rescuers did not reach him in time. Fretwell is sentenced to death *because* he murdered Sherman Sullins in the course of a robbery. See Pet. Cert. A-22. His choice to commit the crime is the cause of the penalty he has incurred. There is a remote chance that a better lawyer might have saved him, but that chance hardly converts the failed attempt into a cause, much less the sole cause.

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit should be reversed.

July, 1992

Respectfully submitted,

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APPENDIX A

Successful Habeas Petitioners		
Last Case	Ineff. Claim	Disp.
Magwood v. Smith, 791 F.2d 1438 (1986)	Yes	Proc.Def
Thomas v. Kemp, 796 F.2d 1322 (1986)	Yes	Accepted
Smith v. Wainwright, 799 F.2d 1442 (1986)	Yes	Accepted
Potts v. Kemp, 814 F.2d 1512 (1987)	Yes[1]	Accepted
Amadeo v. Kemp, 816 F.2d 1502 (1987)	Yes	Not Reached
Elledge v. Dugger, 823 F.2d 1439 (1987)	Yes	Denied
Christopher v. Florida, 824 F.2d 836 (1987)	Yes	Not reached
Magill v. Dugger, 824 F.2d 879 (1987)	Yes	Accepted
Bowen v. Kemp, 832 F.2d 546 (1987)	No	
Dix v. Kemp, 832 F.2d 546 (1987)	No[2]	
Hargrave v. Dugger, 832 F.2d 1528 (1987)	No	
Armstrong v. Dugger, 833 F.2d 1430 (1987)	Yes	Accepted
Dick v. Kemp, 833 F.2d 1448 (1987)	No	
Messer v. Florida, 834 F.2d 890 (1987)	Yes	Denied
Godfrey v. Kemp, 836 F.2d 1557 (1988)	Yes[3]	Denied
Jackson v. Dugger, 837 F.2d 1469 (1988)	No	
Stone v. Dugger, 837 F.2d 1474 (1988)	Yes	Denied
Corn v. Kemp, 837 F.2d 1477 (1988)	Yes[4]	Denied
Mann v. Dugger, 844 F.2d 1446 (1988)	No	
Stephens v. Kemp, 846 F.2d 642 (1988)	Yes	Accepted
Ruffin v. Dugger, 848 F.2d 1512 (1988)	Yes	Denied
Middleton v. Dugger, 849 F.2d 491 (1988)	Yes	Accepted
Cervi v. Kemp, 855 F.2d 702 (1988)	No	
Smith v. Zant, 855 F.2d 712 (1988)	Yes	Not reached
Berryhill v. Zant, 858 F.2d 633 (1988)	Yes	Not reached
Knight v. Dugger, 863 F.2d 705 (1988)	Yes	Denied

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Successful Habeas Petitioners - CONTINUED		
Jones v. Dugger, 867 F.2d 1277 (1989)	Yes	Denied
Harris v. Dugger, 874 F.2d 756 (1989)	Yes	Accepted
TOTALS Petitioners: 28	Ineff. Claims: 21	Accepted: 8 Denied: 9 Not reached: 4

Unsuccessful Habeas Petitions	
Last Case	Ineffectiveness Claim
Bowden v. Kemp, 793 F.2d 273	Yes, see 733 F.2d 740
Tafero v. Wainwright, 796 F.2d 1314	Yes
Tucker v. Kemp, 802 F.2d 1293	Yes, see 762 F.2d 1480
Hall v. Wainwright, 805 F.2d 945	Yes
Demps v. Wainwright, 805 F.2d 1426	No
Johnson v. Wainwright, 806 F.2d 1479	Yes
White v. Wainwright, 809 F.2d 1478	No
Dobbs v. Kemp, 809 F.2d 750	Yes, see 790 F.2d 1499
Ritter v. Smith, 811 F.2d 1398	No
Mulligan v. Kemp, 818 F.2d 746	Yes, see 771 F.2d 1436
Tucker v. Kemp, 818 F.2d 749	Yes, see 762 F.2d 1496
High v. Kemp, 819 F.2d 988	Yes
Lindsey v. Smith, 820 F.2d 1137	Yes, see 820 F.2d 1137
Foster v. Dugger, 823 F.2d 402	Yes
Darden v. Dugger, 825 F.2d 287	Yes
Booker v. Dugger, 825 F.2d 281	Yes
White v. Dugger, 828 F.2d 10	No
Ritter v. Thigpen, 828 F.2d 662	Yes

CONTINUED

Unsuccessful Habeas Petitions - CONTINUED	
Mitchell v. Kemp, 827 F.2d 1433	Yes
Lightbourne v. Dugger, 829 F.2d 1012	Yes, 829 F.2d 1012
McCorquodale v. Kemp, 829 F.2d 1035	No
Davis v. Kemp, 829 F.2d 1522	Yes
Messer v. Kemp, 831 F.2d 946	Yes
Clark v. Dugger, 834 F.2d 1561	Yes, see 834 F.2d 1561
Presnell v. Kemp, 835 F.2d 1567	No
Fleming v. Kemp, 837 F.2d 940	Yes, see 560 F.Supp. 525
Daugherty v. Dugger, 839 F.2d 1426	Yes
Willis v. Kemp, 838 F.2d 1510	Yes, see 720 F.2d 1212
Smith v. Dugger, 840 F.2d 787	Yes
Julius v. Johnson, 840 F.2d 1533	Yes, see 840 F.2d 1533
Buford v. Dugger, 841 F.2d 1057	Yes
Harich v. Dugger, 844 F.2d 1464	Yes
Williams v. Kemp, 846 F.2d 1276	Yes
Stewart v. Dugger, 847 F.2d 1486	Yes, see 847 F.2d 1486
Bundy v. Dugger, 850 F.2d 1402	Yes
Dunkins v. Thigpen, 854 F.2d 394	Yes, see 854 F.2d 344
Singleton v. Thigpen, 856 F.2d 126	Yes, see 847 F.2d 668
Gates v. Zant, 863 F.2d 1492	Yes
Richardson v. Johnson, 864 F.2d 1536	Yes
Griffin v. Dugger, 874 F.2d 1277	Yes, see 760 F.2d 1505
TOTALS Petitioners: 40	Ineff. Claims: 34

1. See 575 F.Supp. 374, 387.
2. Consolidated with Bowen v. Kemp. See 832 F.2d, at 620.
3. See 613 F.Supp. 737, 758-760.
4. See 708 F.2d 549, 560.